(2)

No. 06-651

FILED
JAN 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

ELIZABETH MELLEY AND JEAN MIKULIS,
Petitioners,

v.

BLUE CROSS OF NORTHEASTERN PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN F. SCHULTZ *
KRISTOFOR T. HENNING
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963.5385

* Counsel of Record

Counsel for Respondent Blue Cross of Northeastern Pennsylvania

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded, applying the proper legal standard or the legal standard Petitioners themselves advocated, that Petitioners lacked standing to pursue claims for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA").

PARTIES TO THE PROCEEDING

Petitioners and Respondent Blue Cross of Northeastern Pennsylvania ("Blue Cross") were the only parties to the proceedings before the Court of Appeals.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Blue Cross does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS ENTERED BELOW	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
A. The Parties	3
B. The Plan	3
C. Blue Cross Disclosed Its Right To Amend The Plan	4
D. The District Court Properly Dismissed Petitioners' Claims	5
E. The Court of Appeals Correctly Affirmed The District Court	7
ARGUMENT	9
I. THE PETITION CONTENDS ONLY THAT THE COURT OF APPEALS MISAPPLIED PROPER LEGAL RULES OR REACHED ERRONEOUS FACTUAL CONCLUSIONS	9
II. NO CONFLICT IN THE COURTS OF APPEALS WARRANTS REVIEW IN THIS COURT	11

TABLE OF CONTENTS—Continued

Page

A. Petitioners' Vague Suggestion Of A Conflict Is Insufficient 11

B. The Third Circuit Followed The "But For" Theory Of ERISA Standing Petitioner Mikulis Proposed And, Therefore, Any Disagreement Regarding That Standard Provides No Occasion For Review In This Court 12

III. EVEN IF PETITIONERS HAD STANDING, THEIR PETITION DOES NOT PRESENT GROUNDS SUFFICIENT TO REVERSE THE COURT OF APPEALS' DECISION 15

CONCLUSION 15

TABLE OF AUTHORITIES

CASES Page

Christopher v. Mobile Oil Corp., 950 F.2d 1209 (5th Cir.), *cert. denied*, 506 U.S. 820 (1992)..... 13

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).....2, 7, 10

Leuthner v. Blue Cross of Northeastern Pennsylvania, 270 F. Supp. 2d 584 (M.D. Pa. 2003). 1, 6

Leuthner v. Blue Cross of Northeastern Pennsylvania, 454 F.3d 120 (3d Cir. 2006)..... 7-9, 13

Lockheed Corp. v. Spink, 517 U.S. 882 (1996)..... 4

Raymond v. Mobile Oil Corp., 983 F.2d 1528 (10th Cir. 1993)..... 13

Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986)..... 13

Swinney v. Gen. Motors Corp., 46 F.3d 512 (6th Cir. 1995)..... 15

Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994)..... 13

STATUTES AND RULES

29 U.S.C. § 1002(7).....2, 6, 9-10

29 U.S.C. § 1002(8).....2, 6, 9-10

29 U.S.C. § 1132(a)(3) 2, 6, 7, 9

Sup. Ct. Rule 10..... 9

Sup. Ct. Rule 14.1(a)..... 15

In the Supreme Court of the United States

No. 06-651

ELIZABETH MELLEY AND JEAN MIKULIS,
Petitioners,

v.

BLUE CROSS OF NORTHEASTERN PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS ENTERED BELOW

The Court of Appeals' opinion (Pet. App. 1-23) is reported at 454 F.3d 120 (3d Cir. 2006). Its order denying rehearing (Pet. App. 72-73) is unreported. The District Court has entered several decisions and orders, some of which are pertinent to the Petition. The District Court granted summary judgment in favor of Blue Cross and against the original plaintiffs with leave for the original plaintiffs to file an amended complaint. *Leuthner v. Blue Cross of Northeastern Pennsylvania*, 270 F. Supp. 2d 584 (M.D. Pa. 2003); Pet. App. 24-45. In unreported July 9, 2003 and August 10, 2004 decisions, the District Court denied class certification. The District Court's decisions dismissing Petitioners' claims for lack of standing are unreported. Pet. App. 46-57; Pet. App. 58-65.

INTRODUCTION

In 2001, Blue Cross amended an ERISA plan that provided and continues to provide employer contributions toward the health insurance of certain retirees. After the amendment, two Blue Cross retirees filed a putative class action against Blue Cross alleging that it breached its fiduciary obligations under ERISA by misrepresenting to them that they would receive greater employer contributions than were provided after the amendment. When those retirees were unsuccessful in their attempt at class certification, Petitioners (who are represented by the same counsel who represents the original retiree plaintiffs) intervened and attempted (unsuccessfully) to obtain certification of a class of their own. Not only did the District Court deny Petitioners' class certification motion, but it also dismissed their claims for lack of standing. The Court of Appeals subsequently affirmed the dismissal of Petitioners' claims.

In relevant part, ERISA permits only a "participant" or "beneficiary" to sue. 29 U.S.C. § 1132(a)(3). To satisfy ERISA's definition of "participant" or "beneficiary," a claimant must show that she is or may become eligible for, or entitled to benefits under, the relevant ERISA plan. 29 U.S.C. §§ 1002(7)-(8). In addition to the statutory definitions Congress provided in ERISA, this Court provided further guidance regarding the meaning of "participant" in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In this case, there is no dispute that after the 2001 amendment, Petitioners were no longer eligible for a contribution from Blue Cross toward their health insurance and could not take any action to become eligible for such a contribution. Under ERISA and *Firestone*, therefore, Petitioners could not qualify as "participants" or "beneficiaries."

The Petition does not claim that the Court of Appeals applied incorrect definitions of "participant" or "beneficiary" or did not apply this Court's guidance in *Firestone*. Instead,

it argues only that the Court of Appeals misapplied those settled legal principles and, furthermore, made erroneous factual conclusions in the course of its analysis. That is not a proper basis for review in this Court. Moreover, the Petition assumes Petitioners made factual allegations that they did not make in the courts below. Despite being permitted to amend her complaint, for instance, Petitioner Mikulis did not allege what she would have done without Blue Cross's alleged misrepresentations before her retirement that could have afforded her standing to sue. A petition for review in this Court cannot be used to cure pleading deficiencies in the courts below.

Petitioners have also suggested that the Court of Appeals' decision conflicts with those of other Courts of Appeals. Petitioners, however, have described the alleged conflict only in vague generalities. Moreover, for the only discrete legal issue on which the Courts of Appeals may disagree, the Court of Appeals in this case actually followed the legal rule Petitioners proposed. Even under that rule, however, the factual inadequacies in Petitioners' complaints prevent them from establishing standing.

STATEMENT OF THE CASE

A. The Parties

Blue Cross is a Pennsylvania non-profit corporation with its principal place of business in Wilkes-Barre, Pennsylvania. Pet. App. 7 (¶ 7). Petitioner Mikulis retired from Blue Cross in February 1993 with slightly less than thirteen (13) years of service. Pet. App. 3. Petitioner Melley is the widow of a deceased Blue Cross retiree. Pet. App. 4.

B. The Plan

Blue Cross sponsors and administers the Blue Cross of Northeastern Pennsylvania Retiree Health Insurance Plan ("the Plan"), which is an employee welfare benefit plan

subject to ERISA. Pet. App. 2. The Plan provides employer contributions toward the health insurance of eligible Blue Cross retirees based on their years of service. Pet. App. 2-3. From at least 1993 to January 1, 2001, Blue Cross contributed a percentage of the total cost of an eligible retiree's health insurance based on his/her years of service. Pet. App. 2-3. Also during that time, the Plan provided employer funded health insurance to surviving spouses of eligible Blue Cross retirees. Pet. App. 2-3.

Effective January 1, 2001, Blue Cross amended the Plan to provide for fixed dollar employer contributions toward an eligible retiree's health insurance, still based on his/her years of service. Pet. App. 3. As a result of the 2001 Plan amendment, retirees like Petitioner Mikulis with less than fifteen (15) years of service were no longer eligible to receive a contribution from Blue Cross toward their health insurance. Pet. App. 3. Also effective January 1, 2001, the Plan no longer provided employer funded health insurance to surviving spouses like Petitioner Melley. Pet. App. 3. Thus, after January 1, 2001, neither Petitioner was eligible for a contribution from Blue Cross toward her health insurance under the terms of the Plan.

C. Blue Cross Disclosed Its Right To Amend The Plan.

There is no question that Blue Cross was and is entitled to amend or terminate the Plan at any time. Indeed, as the Court of Appeals explained, Petitioners "no longer contend that the amendment of the plan constituted a breach of fiduciary duty." Pet. App. 5. Nor could they. Because the amendment of an ERISA welfare benefit plan does not constitute a "fiduciary act," it is clear that Blue Cross "did not violate ERISA by amending the Plan." Pet. App. 13 (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996)). The Petition does not dispute that conclusion.

Not only did Blue Cross have the right to amend or terminate the Plan, but it publicly announced that right to its employees and retirees. In April 1993, for instance, Blue Cross distributed a Summary Plan Description ("SPD") for the Plan to its employees explaining that it could amend or terminate the benefits provided under the Plan. Pet. App. 80 (¶ 26); Pet. App. 103 (¶ 34); JA 85.[1] A memorandum that accompanied the SPD indicated that it "explains the health insurance benefits you may be entitled to should you retire from Blue Cross" and encouraged the reader to "familiarize yourself with this document." JA 79. Later, in August 1998, Blue Cross sent an SPD to its retirees indicating that it "reserves the right to modify or amend the Plan, in whole or in part, or terminate the Plan at any time and for any reason." Pet. App. 105 (¶ 50); JA 177; JA 173. Petitioners also attached to their complaint an additional document that disclosed Blue Cross's "right to change, modify or eliminate any benefit in the future." JA 93.

In fact, earlier in this litigation, the District Court found that "Blue Cross stated 'clearly and unequivocally' in SPDs that it reserved the right to modify or amend the Plan[.]" Pet. App. 37. The court further recognized that the Plan itself provided in 1993 (among other years) that "Blue Cross 'reserves the right to amend the Plan in any respect and to terminate the Plan for retirees at any time.'" Pet. App. 33. The Petition does not challenge either of these conclusions.

D. The District Court Properly Dismissed Petitioners' Claims.

Approximately two (2) years after Blue Cross disclosed the 2001 Plan amendment, two retirees filed a putative class action against Blue Cross in the United States District Court

---

[1] References to "JA" are to exhibits to one or both Petitioners' complaints included in the joint appendix filed with the Court of Appeals.

for the Middle District of Pennsylvania. Pet. App. 24. The retirees alleged, *inter alia*, that Blue Cross breached its fiduciary duties under ERISA by misrepresenting to them that they would receive fully funded health insurance from Blue Cross for their entire lives. After the District Court denied the retirees' first motion for class certification, Petitioners intervened and asserted their own misrepresentation breach of fiduciary duty claims against Blue Cross on behalf of a putative class. Pet. App. 76-115.

The District Court rejected Petitioners' attempt at class certification and dismissed their claims because they were not "participants" or "beneficiaries" within the meaning of ERISA (29 U.S.C. §§ 1002(7) and (8)) and, therefore, lacked statutory standing. *Cf.* 29 U.S.C. § 1132(a)(3) (in relevant part, permitting only a "participant" or "beneficiary" to sue); Pet. App. 46-57; Pet. App. 58-65. In order to satisfy the definition of "participant" or "beneficiary" under ERISA, a plaintiff must show, *inter alia*, that she "is or may become eligible to receive [or entitled to] a benefit" under an ERISA plan. 29 U.S.C. § 1002(7); 29 U.S.C. § 1002(8). As a result of the January 2001 Plan amendment, however, there was no dispute that Petitioners were no longer eligible for benefits under the Plan and that they could not take any action to become eligible for Plan benefits. Pet. App. 52-53; Pet. App. 61-64. Therefore, Petitioners were not "participants" or "beneficiaries." The District Court rejected Petitioner Mikulis' argument that, although she was not a "participant" when she sued, the court should not dismiss her claims because "but for" Blue Cross's alleged fiduciary breach, she would have been a "participant." Pet. App. 53, 64. As the District Court explained, the January 2001 Plan amendment, not Blue Cross's alleged misrepresentations (its only alleged fiduciary breach), divested Petitioner Mikulis of her status as a "participant." Pet. App. 53, 64.

E. The Court Of Appeals Correctly Affirmed The District Court.

The Court of Appeals affirmed the District Court's decision. Pet. App. 1-21. The court applied the well-established definitions of "participant" and "beneficiary" Congress provided in ERISA as well as this Court's guidance regarding the meaning of "participant" in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Pet. App. 6-7. Relying on and applying these settled legal principles, the Court of Appeals addressed and rejected Petitioners' arguments for standing.

The Court of Appeals first rejected Petitioners' argument that they have standing because they fall within the "zone of interest" ERISA was intended to protect. Pet. App. 8-11. As the court noted, "it would make little sense for Congress to have enacted ERISA § 502(a)(1) to define who may bring suit . . . if standing to sue were to be determined by the traditional 'zone of interest' prudential standing test." Pet. App. 10. The Petition does not argue that this Court should accept review to determine whether a "zone of interest" test trumps the express list of persons Congress permitted to sue in § 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)).

The Court of Appeals then applied *Firestone* and concluded that if Petitioners "raised a colorable claim of . . . a breach [of fiduciary duty] and detrimental reliance, then they would have standing because they would have a colorable claim to be eligible for equitable relief under § 502(a)(3)." Pet. App. 14. Petitioner Melley, however, could not establish standing under *Firestone*'s "colorable claim" test because Blue Cross's alleged fiduciary breach did not divest her of standing. Pet. App. 14. The January 2001 Plan amendment (which Petitioners do not contend violated ERISA's fiduciary obligations) did that. Pet. App. 14, 13, 5.

Petitioner Mikulis (but not Petitioner Melley) attempted to establish standing by arguing that "but for" Blue Cross's

alleged misrepresentations, she would have been a "participant" because she would have continued working to obtain at least fifteen (15) years of service and, therefore, would have been eligible for a contribution from Blue Cross toward her health insurance after the January 2001 Plan amendment. Pet. App. 14-18. Over Blue Cross's objection, the Court of Appeals adopted the "but for" theory of standing Petitioner Mikulis proposed and concluded that a plaintiff can establish standing by showing that "the alleged breach of fiduciary duty . . . has caused the claimant to lose status as a plan participant." Pet. App. 15, Pet. App. 15-17. Even under the legal test she requested, however, Petitioner Mikulis could not prevail. Petitioner Mikulis did not allege for how much longer she claims she would have worked at Blue Cross if she knew Blue Cross could amend the Plan — even though the District Court previously instructed her to allege with specificity the action or inaction she claimed to have taken in reliance on Blue Cross's alleged misrepresentations and the harm she claims to have suffered. Pet. App. 17; Pet. App. 56.[2] At times, the Petition attempts to correct that factual deficiency in Petitioner Mikulis' complaint by suggesting that she would have worked at Blue Cross long enough to obtain a contribution toward her health insurance after the January 2001 Plan amendment. The complaint itself (which obviously controls), however, does not include such an allegation. Thus, as the Court of Appeals explained: "There is no basis to conclude from the allegations in the complaint that, even if she had worked longer, she would still have qualified for benefits after the 2001 amendment." Pet. App. 17.

---

[2] At the time Petitioner Mikulis retired, Blue Cross had not determined nor disclosed that fifteen (15) years of service would be required to obtain Plan benefits in 2001 and, therefore, it seems that she did not attach any significance to accumulating fifteen (15) years of service at that time. Pet. App. 17.

Finally, the Court of Appeals concluded that Petitioner Mikulis did not allege an actionable misrepresentation from Blue Cross. Pet. App. 17-18. "A representation is not a misrepresentation if it is an accurate reflection of the plan administrator's intent when the statement was made." Pet. App. 18. Because Petitioners (and specifically Petitioner Mikulis) did not allege that any representation from Blue Cross was false at the time it was made, the Court of Appeals concluded that "there is no ground to assert a breach of fiduciary duty." Pet. App. 18. In the Petition, Petitioners do not dispute that they did not allege a representation from Blue Cross that was false at the time it was made.

ARGUMENT

I. THE PETITION CONTENDS ONLY THAT THE COURT OF APPEALS MISAPPLIED PROPER LEGAL RULES OR REACHED ERRONEOUS FACTUAL CONCLUSIONS.

Review in this Court is generally not available where the Petition asserts only the misapplication of properly stated legal rules or erroneous factual conclusions by the lower court. Sup. Ct. Rule 10. That is precisely the case here. Petitioners do not complain that the Court of Appeals applied an incorrect legal rule or a legal rule that conflicts with a decision from this Court. Instead, they complain only about the court's application of settled legal principles and a legal rule they proposed as well as the court's reading of the allegations in their complaints. None of Petitioners' complaints presents sufficient reason for review.

In relevant part, ERISA permits only a "participant" or "beneficiary" to sue. 29 U.S.C. § 1132(a)(3). Congress provided statutory definitions of both "participant" and "beneficiary" and this Court provided further guidance regarding the meaning of "participant" in *Firestone*. 29 U.S.C.

§§ 1002(7)-(8); *Firestone*, 489 U.S. at 118. In *Firestone*, this Court explained:

> [T]he term "participant" is naturally read to mean either "employees in, or reasonably expected to be in, currently covered employment," or former employees who "have . . . a reasonable expectation of returning to covered employment" or who have "a colorable claim" to vested benefits. In order to establish that he or she "may become eligible" for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. "This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable claim to vested benefits 'may become eligible.'"

Firestone, 489 U.S. at 117-18 (citation omitted). Petitioners do not dispute that the Court of Appeals applied the correct definitions of "participant" and "beneficiary" and also applied this Court's guidance in *Firestone* regarding the meaning of "participant" and, specifically, *Firestone*'s "colorable claim" test. Pet. App. 6-7; 11-18. Neither do Petitioners argue that *Firestone*'s guidance is incorrect. To the contrary, Petitioners claim only that the Court of Appeals misapplied both the definitions of "participant" and "beneficiary" from ERISA and the "colorable claim" test from *Firestone*. Pet. 13 ("The Third Circuit in this case did not properly apply this latter test [i.e., the "colorable claim" test].").

Petitioner Mikulis' claim that she has standing because she would have been a "participant" "but for" Blue Cross's alleged fiduciary breach (*i.e.*, its alleged misrepresentations) also does not provide a basis for review. At Petitioner Mikulis' request, the Court of Appeals ruled that a plaintiff can establish standing under ERISA by showing that "the alleged breach of fiduciary duty . . . has caused the claimant to lose status as a plan participant." Pet. App. 15, Pet. App.

15-17. Although Blue Cross does not believe the plain text of ERISA permits such a "but for" theory of standing, the Court of Appeals adopted the standard advocated by Petitioner Mikulis. Pet. App. 14 ("Mikulis has, however, raised a related argument — 'but for' Blue Cross's misrepresentations she would have retired later and would currently be a Plan participant.").

Even under that standard, however, Petitioner Mikulis could not establish standing. After several chances to file an adequate pleading, she still had not alleged how much longer she claims she would have worked at Blue Cross if she knew Blue Cross could amend or terminate the Plan — let alone that she would have obtained fifteen (15) years of service. Pet. App. 17-18. As explained above, the District Court previously instructed her to allege with specificity the action or inaction she claimed to have taken in reliance on Blue Cross's alleged misrepresentations and the harm she claims to have suffered. Pet. App. 56. As a result, there was and is no basis to conclude that Petitioner Mikulis would have been eligible for Plan benefits after the January 2001 Plan amendment. Pet. App. 17. This pleading deficiency cannot be corrected now, in a petition for review in this Court. Accordingly, even if this Court were to adopt the "but for" theory of ERISA standing Petitioner Mikulis proposed, the factual deficiencies in her complaint would preclude her from obtaining relief.

II. NO CONFLICT IN THE COURTS OF APPEALS WARRANTS REVIEW IN THIS COURT.

A. Petitioners' Vague Suggestion Of A Conflict Is Insufficient.

Petitioners argue that appellate caselaw "suggests" there is a conflict among the lower courts regarding the "method of applying standing principles such as those outlined in *Firestone*. . . ." Pet. 10. Petitioners fail, however, to describe

the alleged conflict with any specificity. The Petition does not, for example, describe (1) the alleged different "method[s] of applying" ERISA's definitions of "participant" and "beneficiary" or this Court's guidance in *Firestone*; (2) how those approaches allegedly differ; or (3) how review in this Court allegedly would affect this case — even assuming a conflict. Instead, Petitioners have contrasted what they characterize as "broad standing principles" and "more restrictive and narrow principles" without attempting to identify any legally distinct difference between the two. Pet. 11-12. Petitioners have left this Court to guess, therefore, what alleged conflict supposedly requires resolution.

In reality, Petitioners ask this Court to review the application of what they believe are correctly stated legal rules to particular allegations. For instance, Petitioners cite cases from within the same circuit that they claim adopt both broad and narrow ERISA standing principles. Pet. 11-12. In fact, Petitioners' citations reflect nothing more than the unremarkable proposition that courts reach different results with regard to ERISA standing in different cases based on different allegations. Pet. 11-12. That is not a basis for review in this Court.

B. The Third Circuit Followed The "But For" Theory Of ERISA Standing Petitioner Mikulis Proposed And, Therefore, Any Disagreement Regarding That Standard Provides No Occasion For Review In This Court.

It is true that the Courts of Appeals do not uniformly accept and apply the "but for" theory of ERISA standing Petitioner Mikulis urged and the Court of Appeals adopted in this case. Although some courts afford standing to a former "participant" or "beneficiary" who can show that "but for" the defendant's alleged fiduciary breach, he/she would still be a "participant" or "beneficiary," others do not. *Compare,*

e.g., *Leuthner v. Blue Cross of Northeastern Pennsylvania*, 454 F.3d 120, 128-29 (3d Cir. 2006) (Pet. App. 16); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221-23 (5th Cir.), *cert. denied*, 506 U.S. 820 (1992); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702-03 (1st Cir. 1994) *with Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1536 (10th Cir.), *cert. denied*, 510 U.S. 822 (1993); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986). Here, however, this disagreement was resolved in favor of Petitioner Mikulis, and she still could not establish standing.

As explained above, over Blue Cross's objection, the Court of Appeals in this case adopted the "but for" theory of standing Petitioner Mikulis proposed. Pet. App. 15; Pet. App. 15-17. Petitioner Mikulis could not establish standing even under the "but for" theory she requested because she did not allege (after several chances) how much longer she would have worked at Blue Cross if she had known Blue Cross could amend or terminate the Plan. That pleading failure provides no basis for review in this Court.

Petitioner Mikulis has suggested that the Court of Appeals improperly applied the "but for" theory of standing by using a "heightened pleading requirement." Pet. 13, 16. Petitioner Mikulis is incorrect and, in any event, her suggestion does not warrant review in this Court. The Court of Appeals did not apply a "heightened pleading standard" and Petitioner Mikulis has not cited any evidence that it did. Pet. 13, 16. Instead, the court correctly concluded that, after several chances, Petitioner Mikulis failed to make the factual allegation(s) necessary to support standing under her own "but for" theory, even though it is her burden to do so. Petitioner Mikulis, in fact, has not disputed that her complaint does not allege how much longer she claims she would have worked for Blue Cross if she had known it could amend the Plan. In other words, the critical allegation simply does not exist under any pleading standard. Not only that, but the

questions presented in the Petition do not mention an allegedly improper "heightened pleading standard" and, therefore, Petitioners cannot properly seek review in this Court on that basis. Moreover, Petitioner Mikulis claims, at most, that the Court of Appeals misapplied a legal rule she requested and made erroneous factual conclusions.

Petitioners also urge this Court to decide, as a matter of public policy, that a defendant may not deprive a claimant of ERISA standing through allegedly improper conduct that is alleged to violate ERISA. Pet. 10-11; 15. This Court, however, has already provided guidance regarding the definition of "participant" in *Firestone* and Petitioners do not argue that guidance is incorrect or should be revisited. In any event, Petitioners' public policy assertions do not merit review. Initially, to the extent Petitioners ask this Court to hold that they have standing because "but for" the January 2001 Plan amendment, they would have been "participants" or "beneficiaries," they have misunderstood their own claims. Pet. 15 ("Blue Cross should not be permitted to shield itself from liability for its false promise . . . by simply terminating the health benefits entirely."). As explained above, Petitioners do not claim that the January 2001 Plan amendment violated ERISA and the "but for" theory of standing Petitioner Mikulis proposed would apply only if the employer's conduct *alleged to violate* ERISA divested them of standing. Pet. App. 14. Moreover, the public policy considerations Petitioners cite are already incorporated into the "but for" theory of standing the Court of Appeals adopted in this case. Pet. App. 16 ("A plan administrator's alleged ERISA violation should not be the means by which the plan is able to insulate itself from suits arising from the alleged violation."). Even under the legal test that resulted from those policy considerations, however, Petitioners cannot establish standing because of the factual inadequacies in their complaints.

III. EVEN IF PETITIONERS HAD STANDING, THEIR PETITION DOES NOT PRESENT GROUNDS SUFFICIENT TO REVERSE THE COURT OF APPEALS' DECISION.

Petitioners have asked this Court to decide only whether they have standing to assert misrepresentation breach of fiduciary duty claims against Blue Cross. Pet. i-ii; Sup. Ct. Rule 14.1(a). Even if Petitioners had standing, however, their Petition does not present grounds sufficient to reverse the Court of Appeals' decision because they have not alleged an actionable misrepresentation from Blue Cross. Petitioners have not challenged the Court of Appeals' conclusion that "[a] representation is not a misrepresentation if it is an accurate reflection of the plan administrator's intent when the statement was made" or disputed the court's finding that their complaints did not allege any representation from Blue Cross that was false at the time it was made. Pet. App. 18; *Swinney v. General Motors Corp.*, 46 F.3d 512, 520 (6th Cir. 1995). Therefore, even if Petitioners had standing, they could not sustain their breach of fiduciary duty claims. Pet. App. 18.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

JOHN F. SCHULTZ *
KRISTOFOR T. HENNING
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963.5385

* Counsel of Record

Counsel for Respondent Blue Cross of Northeastern Pennsylvania

January 10, 2007